

## PURPOSE TRUSTS: AN OFFSHORE PERSPECTIVE

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### The Beneficiary Principle under English Law

- 1 In English law trusts for purposes fail *in limine*. In this area all the books<sup>3</sup> begin with a reference to the *locus classicus* of *Morice v Bishop of Durham*<sup>4</sup> in which William Grant MR observed "every other [i.e. non-charitable] trust must have a definite object. There must be somebody in whose favour the court can decree performance". In English law the matter is beyond doubt<sup>5</sup>. Purpose trusts fail as they breach the 'beneficiary principle' that a valid trust requires a person in whose favour a court can decree performance.<sup>6</sup>

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3 Hanbury & Martin, *Modern Equity*, 15 ed., Chapter 14; Underhill & Hayton, *Law of Trusts and Trustees*, 15th ed. 92-93; Parker & Mellows, *The Modern Law of Trusts*, 7th ed., 105.

4 (1805) 10 Ves. 522.

5 For an alternative view, see Baxendale-Walker, "Purpose Trusts" (Butterworth 1999).

6 See, Paul Matthews, 'The New Trust; Obligations Without Rights', in which the learned author observes that "In the beginning there were people. Trusts did not come into existence because animals or trees in California complained to the Chancellor that property given to trustees for their benefit was being misapplied. They were called into existence because *people* complained because *people* presented petitions, because *people* pleaded for justice before the Chancellor as the keeper of the King's conscience".

Somewhat artificially, perhaps, in the context of charity the view is taken that the Attorney General is charged with the duty of enforcement. In the case of purely private purposes the Attorney General has no interest in enforcement which would enable the trustees to misapply the property by, for example, holding it absolutely for themselves as no one would have *locus standi* to complain. The beneficiary principle can also be viewed as an objection to the absence of a beneficial owner of the property<sup>7</sup>. It is clear, however, since the House of Lords decision in *McPhail v Doulton*<sup>8</sup> that beneficial ownership may remain outstanding and that a discretionary object without a beneficial interest<sup>9</sup> may still seek to enforce a trust.

#### A Requirement for Certainty

2. Notwithstanding the beneficiary principle, in those rare cases referred to at paragraph 5 below, in which the ordinary rule is suspended, there remains an additional requirement that the purposes of a trust are sufficiently certain to permit a court to control the application of funds. As was stated in *Morice v Bishop of Durham*<sup>10</sup> “there can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of trust, is indisposed of; and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner”. This important principle still applies in most jurisdictions in which the law has been changed by statute to invalidate purpose trusts. As we shall see, however, an exception in this regard is found in purpose trusts created under the Special Trusts (Alternative Regime) Law 1997 of the Cayman Islands.

#### Modern Examples of the Rule Against Non-Charitable Purpose Trusts

1. In *Re Astor's Settlement Trusts*<sup>11</sup> a settlement in which the trustees were directed to hold the fund upon various trusts including “the maintenance of

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<sup>7</sup> See Hanbury & Martin, *supra* at 351.

<sup>8</sup> [1971] AC 424.

<sup>9</sup> *Gartside v IRC* [1968] 1 All ER 121.

<sup>10</sup> (1805) 10 Ves. 522.

<sup>11</sup> [1952] Ch 534.

good relations between nations... the preservation of the independence of the newspapers," and other similar purposes in favour of independent newspapers was held void as there was no one who could enforce the trust and because its purposes were uncertain. Similarly in *Re Shaw*<sup>12</sup> George Bernard had provided that the residue of his estate should be applied in the development of a forty-letter alphabet and that one of his plays should be translated into the new alphabet. Again the gift failed on the beneficiary principle. In *Re Endicott*<sup>13</sup> a gift in the sum of twenty thousand pounds to a parish council "for the purpose of providing some useful memorial to myself" failed as the purpose was considered by the English Court of Appeal to be too wide and uncertain. In *Re District Auditor, ex p. West Yorkshire Metropolitan County Council*<sup>14</sup> an attempt by a local authority to create a trust "for the benefit of any or all or some of the inhabitants of the County of West Yorkshire" in any of four ways: (i) to assist economic development in the County in order to relieve unemployment and poverty; (ii) to assist bodies concerned with youth and community problems in West Yorkshire; (iii) to assist and encourage ethnic and minority groups in West Yorkshire; and (iv) to inform all interested and influential persons of the consequences of the abolition of the council and other metropolitan county councils and of the proposals affecting local government in the county, was held void as a non-charitable purpose trust.

#### **Exceptions to the Rule/Avoiding the Rule**

- 4 The rule, however, in English law is not always strictly nor consistently applied. First, there is a category of anomalous cases in which purpose trusts are not invalid including provision for building and maintaining a tomb or gravestone, provision for the maintenance of specific animals, provision for the saying of masses and perhaps, most curiously, trusts in support of fox hunting.<sup>15</sup> Trusts which fall into the latter category if restricted to the English perpetuity period of 21 years (in the obvious absence of lives in being) will, notwithstanding their "imperfect obligation", be invalid and may be enforced by the trustee if the latter so wishes. In this sense they are analogous to powers rather than trusts in that no one can force the trustee to comply with the settlor's intention.

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<sup>12</sup> [1957] 1 WLR 729.

<sup>13</sup> [1960] Ch. 232.

<sup>14</sup> [1986] RVR 24.

<sup>15</sup> *Re Thompson* [1934] Ch 342.

- 5 Secondly, gifts to unincorporated associations (a club or a society) can be construed either as a gift for the purposes of such unincorporated association which renders the gift void or as a gift to the members of the unincorporated association absolutely which is valid. A gift to the members may be to past, present and future members or to any combination of these,<sup>16</sup> in any event as long as the existing members are able to get together and wind up the association and divide its funds then the gift may be construed as a gift to the members.<sup>17</sup> Such a construction, however, did not permit enforcement of the purpose trust in *Leahy v Attorney General from New South Wales*,<sup>18</sup> where a testator provided that real property in Australia should be held upon trust for "such order of nuns of a Catholic Church or the Christian Brothers as the executors and trustees shall select". The gift was not valid as a charitable trust because some of the orders were purely contemplative. In view of the nature of the property and the fact that the members of the selected orders might be very numerous and spread across the world, it was held that since there was no intention to create a trust in favour of the individual members of the selected orders, as such, the testator's intention was to establish an endowment.
- 6 Thirdly, gifts which indirectly benefit persons may be upheld on the so-called *Re Denley* principle. In *Re Denley's Trust Deed*<sup>19</sup> a plot of land was conveyed to trustees with a valid perpetuity restriction "for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company and secondly for the benefit of such other person or persons (if any) as the trustees may allow". This gift was upheld by Goff J. who concluded that the beneficiary principle applies to trusts where there is no benefit indirect or otherwise for persons or that benefit is so indirect or intangible as not to give those persons any *locus standi* to apply to the court to enforce the trust. This line of reasoning was subsequently applied to *Re Lipinski's Will Trusts*<sup>20</sup> where a gift to the *Hull Judeans (Maccabi) Association* "in memory of my late wife to be used solely in the work of constructing the new buildings for the association and/or improvements to the said buildings" was upheld in part under the construction permitted by *Re Denley*.

<sup>16</sup> See discussion of Cross J in *Neville Estates v Madden* [1962] Ch. 832.

<sup>17</sup> See discussion in Hanbury & Martin, *supra* 361.

<sup>18</sup> [1959] AC 457.

<sup>19</sup> [1969] Ch 373.

<sup>20</sup> [1976] Ch 235.

### Perpetuity

- 7 There are two elements to the rule against perpetuities: the rule against remoteness of vesting and the rule against excessive duration or inalienability. The first well-known rule ensures that all future interests must vest in interest within the perpetuity period. Thus at common law if there is any contingency in a gift it must be certain that all interests will vest in interest within the common law perpetuity period. The second rule is one against excessive duration which is sometimes called the rule against inalienability or perpetual endowment. The rule against remoteness of vesting is inappropriate when interests cannot vest in purposes as opposed to persons.<sup>21</sup> In English law the rule against excessive duration ensures that those few permitted non-charitable endowment purpose trusts will be void unless from the outset they are certain to terminate by the end of the perpetuity period. These common law restrictions have been amended by statute in both the Cayman Islands and Bermuda.

### Charitable Trusts

8. In English law charity is a term of art. In order to qualify as a valid charitable trust, the purposes must fall within one of the recognised heads of charity.<sup>22</sup> Any discussion of purpose trusts must consider four aspects of the law relating to charitable trusts namely, certainty, *cy-pres*, perpetuities and utilisation in the commercial sphere. The latter point is dealt with at paragraphs 21-22 below whilst the former three points are discussed in the next three sub-paragraphs below.
- 8.1 Whilst a purpose trust which falls into the category permitted by English law or which is enforceable by statute in other jurisdictions will fail if the purposes are not sufficiently certain or specifically specific to enable a court to enforce them, a charitable trust will not fail for uncertainty so long as it is exclusively charitable. Thus, a trust for "charitable purposes" will be valid. In such cases the court will establish a scheme for application of the funds.<sup>23</sup>

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<sup>21</sup> Hayton & Marshall, *Cases and Commentary on the Law of Trusts*, 9th ed. at 178.

<sup>22</sup> Hanbury & Martin, *supra*, Ch. 15; Tudor on Charities, 8th ed., 1995.

<sup>23</sup> See also the discussion of the exercise of the Crown's prerogative of Sign Manual in Hanbury & Martin *supra* at 379.

- 8.2 If a charitable gift fails either at the time of or after its creation due to impossibility or a change of circumstances the court in most common law countries has jurisdiction to apply the funds *cy-pres*. Initial failure requires a finding of general charitable intent. A court will try to determine whether the settlor's overriding concern was that the property be used for charity generally or for one of the recognised categories of charity rather than only in the specific manner stated in the will or trust. The question is asked: would the settlor have dedicated the property to charity in any event or did the settlor only wish the property to be applied to the particular charitable purpose originally chosen?<sup>24</sup> In the case of subsequent failure no general charitable intent is required. However, if the settlor has indicated that he has not made an out and out gift to charity then there cannot be a *cy-pres* application. *Cy-pres* involves an application of the property for other charitable purposes as near as possible to those intended by the donor. In the case of statutory purpose trusts both the Cayman Islands and Jersey have attempted to implement a statutory *cy-pres* scheme which is discussed at paragraph 21 below.
- 8.3 The rule against perpetual endowment does not apply to charitable trusts. However, the rule against remoteness of vesting does apply in a rather curious form at common law in that the gift must vest in the charitable trustees within the perpetuity period. Thus, at common law it is not possible to provide for a conditional remainder in favour of a charity that will vest property in the charitable trustees after the expiration of the perpetuity period. This aspect of the rule must, in particular, be borne in mind in relation to Bermuda purpose trusts and is discussed at paragraph 13 below. It should be noted, however, that in the case of charitable trusts once a property vests in charitable trustees for one charitable purpose it is possible to stipulate that property will be transferred to the trustees of a different charitable trust even after the perpetuity period upon the happening of certain conditions.

### Trusts and Powers

- 9 The rule of certainty of objects applies in relation to trusts. However, powers are treated somewhat differently. The essential difference between a trust and a power is that a trust obligates the trustee to deal with it in the manner set out by the trust whereas a power merely enables the holder of the power to act in the manner set out in the power, but does not require the

<sup>24</sup>

Working Paper number 66 at page 22 of the Law Commission of British Columbia, 'Non-Charitable Purpose Trusts', November 1991.

holder to exercise the power.<sup>25</sup> Whilst in English law all purpose trusts save for a narrow aberrant category are void, powers for purposes are perfectly valid. The distinction, of course, is that trustees have a discretion whether to exercise a power whilst they are subject to an obligation to perform a trust obligation. A grantor of a power can, therefore, never be certain that the power will be exercised. If the trust were treated as a power, the trustee could carry out the settlor's intentions even though the trust itself was unenforceable. This position has been accepted in the United States.<sup>26</sup> In a series of cases in the 1950s, the English courts repeatedly rejected the argument that an invalid trust could give rise to a valid power.<sup>27</sup>

- 10 An approach that permitted purpose trusts to be construed as powers (and therefore be valid) was adopted in Ontario and British Columbia<sup>28</sup>. Thus, in these jurisdictions the trustees may, in their discretion, exercise the power within a period of 21 years, however, the court has the discretion to declare the trusts void if it appears that the settlor would rather have had the trust not take effect at all than be effective only for a limited period.

## Enforcement

- 11 Once it is accepted, as it has been in many jurisdictions, that there are significant advantages in allowing the creation of non-charitable purpose trusts the question arises how or by whom these trusts will be enforced and for how long should they be permitted to exist? Clearly, the absence of a beneficiary means that some method of ensuring enforcement must be substituted if the trust is to be effective. As stated above, charitable trusts are enforced by the Attorney General. As will be seen below the statutory regimes in force in Jersey and the Cayman Islands require a named enforcer

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<sup>25</sup> Where it is clear that the donee of the power must exercise the power, the power is known as a "trust power" or "power in the nature of a trust" of which a discretionary trust is the most common example. Where a donee of a power merely *may* exercise it, the power is known as a "mere power" or a "power collateral". If a power is a mere power and it is not exercised the property in question will either pass to the persons whom the settlor stipulated are to take in default of appointment, or, if there are no such persons, it will revert to the estate of the settlor. However, if a trust power is not exercised, the donee of the power has not exercised his trust duty, and in those circumstances the court will exercise it for him.

<sup>26</sup> American Law Institute, Restatement of Trusts (2nd ed. s.124).

<sup>27</sup> *Re Astor's Settlement Trusts*, *supra*, n. 11; Internal Revenue Commissioner's, see *Broadway Cottages Trust* [1955] Ch. 20; *Re Endicott* [1960] Ch. 232 at 246.

<sup>28</sup> The Perpetuities Act 1966 of Ontario, s.16 and Perpetuity Act of British Columbia 1979, of British Columbia, s.21.

to be in office and to be able at all times to call the trustees to account and enforce the purpose trust. This was formerly the position in Bermuda under its seminal Trusts (Special Provisions) Act 1989. Since then, Bermuda has moved towards a recognition that it is the court which enforces the trust and may do so at the behest of different people including anyone with a sufficient interest in the enforcement of the trust. Different views are also taken on the duration of purpose trusts with a statutory limit applicable in both Bermuda and Jersey but not in the Cayman Islands.

### **The Bermuda Model**

- 12 Under the Trusts (Special Provisions) Act 1989 as amended by the Trusts (Special Provisions) Amendment Act 1998 a trust may be created for non-charitable purposes provided that such purposes are sufficiently certain to allow the trust to be carried out and that they are lawful and not contrary to public policy. The 1998 Amendment Act removed the definition that described a trust for purposes as a trust other than a trust "for the benefit of particular persons whether or not immediately ascertainable". The legislation now permits a trust for a mixture of persons and purposes. It will be seen, however, that the legislature in Bermuda decided to retain the requirement for certainty so that trusts in Bermuda will fail unless they are described with sufficient specificity.
- 13 In Bermuda, purpose trusts may only be created by writing<sup>29</sup> and are not subject to the aspect of the perpetuity rule (discussed at paragraph 7 above) known as the rule against excessive duration. The rule against remoteness of vesting, however, is still applicable. It follows that so long as assets are vested in the trustees of a purpose trust within the common law (lives in being plus 21 years) or statutory (100 years) perpetuity periods applicable in Bermuda, they may thereafter continue in perpetuity<sup>30</sup>.
- 14 The Supreme Court of Bermuda may make such order as it considers expedient for the enforcement of a purpose trust on the application of any of the following persons:
  - any person appointed by or under the trust for the purposes of enforcement;
  - the settlor, unless the trust instrument provides otherwise;

<sup>29</sup> Section 12A, Trusts (Special Provisions) Act 1989.

<sup>30</sup> Trusts (Special Provisions) Act 1989, Sections 12A (4) and (5).



- a trustee of the trust;
- any other person whom the court considers has sufficient interest in the enforcement of the trust;

The fall back position is that the Attorney General may make an application for enforcement of the trust if he satisfies the court that there is no person who falls into any of the above categories and who is able and willing to make an application to the court.

The Bermuda court may if it thinks fit on the application of any person appointed by the trust instrument, by the settlor (unless the trust instrument provides otherwise) or by the trustee of the trust, approve a scheme to vary any of the purposes of the trust or to enlarge or otherwise vary any of the powers of the trustee. It was until the Amendment Act of 1998 a requirement for a designated person, i.e. a Bermuda lawyer or accountant or licensed trustee company, to be one of the trustees of a Bermuda purpose trust. This requirement was removed by the 1998 Amendment Act.

### **Cayman STAR Trusts**

- 15 In the Cayman Islands under the Special Trusts (Alternative Regime) Law 1997 ('STAR') a *sui generis* form of "special" trust can be created which may, inter alia, be purely for private (non-charitable) purposes or for charitable purposes or for persons ("a beneficiary trust") or for a mixture of purposes (non-charitable and/or charitable) and persons. The concept of the STAR law was to create an alternative regime under which a new trust can be created. The new law did not affect existing ordinary trusts or powers. This approach was adopted so as not to exclude the vast body of English and Commonwealth case law relating to personal trusts. To that end, the new law expressly provided that the law relating to special trusts and powers was to be the same in every respect as the law relating to ordinary trusts and powers save as provided in the new law. So far as is possible only the purpose trust aspect of STAR will be dealt with here. The principal features of STAR include:

- special trusts have been exempted by the Perpetuities Law 1997 from the rules against perpetuities so that they may, if desired, last for ever. In this regard they are similar to orthodox charitable trusts;

- all special trusts, whether purpose trusts, beneficiary trusts or mixed trusts must have an enforcer who can bring action to enforce the trust and who can seek proprietary tracing remedies against third parties;
- the trustees or court can reform a purpose trust on a *cy-pres* basis where the purposes are uncertain or can no longer be carried out;
- purpose trusts under the STAR regime need only be lawful and not contrary to public policy in order to be valid.

16 A special trust must be created in writing and cannot hold land in Cayman.<sup>31</sup> The instrument must expressly state that the STAR regime applies.<sup>32</sup> Unlike Bermuda or Jersey the trustees must include a Cayman Islands licensed trust corporation.<sup>33</sup> It is, however, possible to have co-trustees that are not licensed trust corporations. The special trust must have an enforcer to enforce the trust.<sup>34</sup> If the trust is a mixed trust for persons and purposes the enforcer may be either an obligatory enforcer or a voluntary enforcer. An obligatory enforcer has a duty to enforce the trust whilst a voluntary enforcer has a right but not a duty to enforce the trusts. The trustee is subject to an obligation to ensure that at all times there is an enforcer who is either a beneficiary or an enforcer who has a duty to enforce. It follows that in the case of a purpose trust which does not also benefit persons there must be an enforcer in office who has a duty to enforce the trust at all times.

17 In the absence of evidence of a contrary intention, an enforcer is deemed by STAR to have a fiduciary duty to act responsibly with a view to the proper execution of the trust.<sup>35</sup> As a practical matter, therefore, it is possible to have a special trust for a mixture of persons and purposes where one of the beneficiaries is the enforcer. Such beneficiary may not be subject to a duty to enforce and, therefore, may decide not to enforce the obligation in respect of purposes. Similarly, the trust may indicate that the enforcer is not subject to any fiduciary obligations. In this regard, the beneficiary would have rights similar to those of a holder of a mere power.

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<sup>31</sup> STAR, s.3 (1) (a).

<sup>32</sup> Section 3 (1) (b).

<sup>33</sup> Section 12 (1) (a).

<sup>34</sup> Section 7.

<sup>35</sup> Section 8 (2).

- 18 Special trusts must be for purposes that are lawful and not contrary to public policy.<sup>36</sup> In this regard STAR differs from purpose trust legislation in other jurisdictions which require specificity or certainty in relation to the purposes.<sup>37</sup> Thus, broad purposes such as the advancement of the arts which may be insufficiently specific to qualify as a valid purpose trust in other jurisdictions would be a valid purpose of a special trust. It remains possible, however, for purpose trusts to fail if the purposes are unlawful or if a court considers that pursuit of the purpose would be contrary to public policy.<sup>38</sup> The latter category may include a purpose which whilst lawful may be capricious or wasteful of resources.
- 19 Special trusts with uncertain objects (either purposes or persons) or an uncertain mode of execution will not fail *ab initio*. The statute permits the settlor to give to the trustees or another person a power to resolve uncertainties.<sup>39</sup> In addition, if an uncertainty cannot or has not been resolved an application can be brought before the Court in Cayman which has a power to resolve any uncertainty by reforming the trust or by settling a plan for the administration of the trust or "in any other way which the Court deems appropriate".<sup>40</sup> Only if the trust is uncertain and the general intent of the trust cannot be found on admissible evidence will a trust be declared void. A statutory *cy-pres* regime has been introduced in respect of special trusts that become impossible, impractical, unlawful or contrary to public policy or simply become obsolete as a result of a change of circumstances. In such event the trustee is subject to an obligation (unless the trust is reformed pursuant to its own terms) to apply to the Court to reform the trust *cy-pres*.<sup>41</sup>

### **Jersey Purpose Trusts**

- 20 Non-charitable purpose trusts are expressly made permissible in Jersey by the Trusts Amendment Number 3 (Jersey) Law 1996. The trust is permitted

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<sup>36</sup> Section 6 (3).

<sup>37</sup> See Bermuda, Trusts (Special Provisions) Act 1989 as amended, s.12A (2).

<sup>38</sup> Section 10(4) (6).

<sup>39</sup> Section 10 (2).

<sup>40</sup> Section 10 (4).

<sup>41</sup> Section 11.

to endure for a perpetuity period of 100 years.<sup>42</sup> Jersey purpose trusts are valid so long as the terms of the trust provide for an appointment of an enforcer in relation to its non-charitable purposes and for the appointment of an enforcer at any time when there is none.<sup>43</sup> In a similar fashion to STAR trusts, the trustee is subject to a duty at a time when there is no enforcer 'to take such steps as may be necessary to secure the appointment of an enforcer'.<sup>44</sup> In addition to having the duty to enforce the trust, the enforcer has the right to see any document that relates to the trust and may apply to the court for an order or declaration concerning the trust. The better view is that the Jersey enforcer is a fiduciary unless the trust instrument provides otherwise.<sup>45</sup>

### Cy-pres and Variation

- 21 Both the Cayman STAR and the Jersey legislation permit for a form of *cy-pres* application in the event of impossibility or impracticability. The Jersey legislation provides:

"Where an interest or property is held by the trustee for a purpose which has ceased to exist or is no longer applicable, that interest or property shall be held for such other purpose as the Court may declare to be consistent with the original intention of the settlor".

As one commentator has observed<sup>46</sup> the prudent advice is to define with specificity the purpose and to provide in the event of failure that the property be applied for some more general purpose. The settlor should also set out the different methods by which such general purpose may be executed. The approach in Cayman is found in section 11 of STAR which enables the trustee to apply to a court if the special trust in whole or in part becomes impossible or impractical, unlawful or contrary to public policy or obsolete by reason of change of circumstances. The application is to perform the trust *cy-pres* consistently "with the general intent of the trust".

<sup>42</sup> See Baxendale Walker, *supra*, n 5 above, Ch. 7.

<sup>43</sup> Trusts (Jersey) Law 1984 as amended by Amendment Act 1996, Article 3.

<sup>44</sup> Trusts Law 1984, Article 17 (7).

<sup>45</sup> Trust Law (Jersey) Law 1984 at Article 17 provides that an enforcer shall not profit from his appointment or cause or enable others to profit from this appointment.

<sup>46</sup> Baxendale-Walker, *supra*, at n 5, at 253.

Only if the court is of the opinion that it cannot be performed consistently with such general intent shall the trustees dispose of the trust property as though the trust had failed.<sup>47</sup> In the case of some specific purposes a general intent may be difficult to glean. For this reason The Law Commission of British Columbia in their 1991 paper on purpose trusts recommended that if no such purpose could be found "the court should be able to substitute a purpose that is not contrary to the spirit of the original settlement". The Law Commission of British Columbia recommended that the court should not have the power to vary the settlement if the settlor is living unless the settlor consents to the proposed scheme.<sup>48</sup>

- 22 *Cy-pres* in the STAR legislation and the Jersey statutory power to declare other purposes will arise out of the fairly limited circumstances of impossibility or impracticability. The Bermuda legislature has permitted variation of a purpose trust in the absence of these factors. The involvement of courts in variations of settlements has been well-known since the 1950s whilst trust instruments frequently empower either trustees or third parties to permit (or consent to) amendments, changes or variations. Such variations may pertain to the administrative powers of the settlement or less frequently to the dispositive powers. The settlor cannot foresee every situation that may arise when deciding upon the powers which the trustees should have, and it is sometimes desirable to expand the trustees' administrative or dispositive powers in order to enable them to carry out the trust effectively.<sup>49</sup> In Bermuda, the Trusts (Special Provisions) Act 1989 as amended by the Amendment Act 1998 now enables the Court to approve a scheme to vary any of the purposes of a trust or to enlarge or otherwise vary the powers of the trustees. An application in this regard may be brought by any person appointed by or under the trust or by the settlor (unless the instrument provides otherwise) or by a trustee of the trust. It will be noted that although a trust may be enforced by any person the Court considers to have sufficient interest in the enforcement, such a person may not bring an application to vary the trust.<sup>50</sup>

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<sup>47</sup> STAR, s.11 (1).

<sup>48</sup> See Law Commission Report, *supra*, at n 24, at 48 and 52.

<sup>49</sup> See Law Commission report, *Ibid*, at n 24 at 48-55. Note, however, that the British Columbia Law Commission considers variation of administrative powers only.

<sup>50</sup> The Supreme Court is at liberty to make such orders as to costs as it considers just. Refer to Clause 12 (3).

### Uses of Purpose Trusts

- 23 Purpose trusts are frequently used for quasi-charitable purposes that do not fall within the four heads of charity: relief of poverty, advancement of education or religion or other purposes beneficial to the community. Thus, special trusts may be used to promote activities that have a political aspect and as such do not qualify as charitable.<sup>51</sup> Alternatively, they may be used to promote purposes which would be charitable but which do not pass the “public benefit” test applicable to all heads of charity except relief of poverty.<sup>52</sup>
- 24 Gifts or donations either outright or upon trust to an unincorporated association (i.e. a club or society) at common law must be construed as a gift to the members as individuals or to the members subject to the rules of the club or society. If the gift is construed as a gift for the non-charitable purposes pursued by the unincorporated association i.e. to promote the game of cricket, anti vivisection, appreciation of fine art, etc, then the gift will fail as an invalid non-charitable purpose trust.<sup>53</sup> The problem with a construction which saves the gift but deems it to be held by the members beneficially is that the members may as a body decide to wind up the trust and take the property themselves. Indeed if the members cannot at least amend the rules and take the property themselves the trust may be construed as a purpose trust and therefore fail. Frequently the grantor of the gift or the settlor of a trust will wish to avoid this possibility.
- 25 Purpose trusts are sometimes construed as trusts indirectly for the benefit of persons.<sup>54</sup> Again, notwithstanding the wishes of the settlor such persons may be able to invoke the *Saunders v Vautier*<sup>55</sup> principle to wind up the trust, the wishes of the settlor notwithstanding. However, this principle does not apply to Cayman STAR trusts as the statute expressly provides that a beneficiary of a STAR trust has no enforceable right to the trust property.
- 26 Purpose trusts can be used instead of charities to hold underlying “orphan” companies. The advantage of such a structure is the ability to claim for tax

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<sup>51</sup> Cf *McGovern v Att-Gen* [1982] Ch. 321.

<sup>52</sup> Hanbury & Martin, *Modern Equity*, 15th ed., at 375 *et seq.*

<sup>53</sup> *Ibid* at 359.

<sup>54</sup> *Denley's Trust Deed* [1969] 1 Ch. 373.

<sup>55</sup> (1841) 4 Bear. 115, affirmed Cr. & Ph. 240.

or accounting purposes<sup>56</sup> that the underlying company is "off balance sheet" the originator behind the transaction. Such a structure is commonplace in securitisations where underlying companies may issue collateralised debt instruments or other securities. In the private trust sphere purpose trusts are frequently used to own private trustee companies which act as trustees of family trusts.<sup>57</sup> The advantage is that ownership of the private trustee company is taken out of the hands of individuals.

- 27 Cayman STAR trusts can be used as substitutes for traditional trusts for persons (i.e. when it is not necessary to have a trust for non-charitable purposes) and the advantages of perpetuity and the exclusion of certain traditional beneficiary rights would still apply. In the case of a Cayman STAR trust for purposes with beneficiaries or where a STAR trust is used as a traditional trust for persons, the rights of beneficiaries to enforce the trust and/or to obtain information relating to the trust can be restricted. For example, where a settlor wishes to provide for his children and grandchildren but is aware that, after his death, one of his children (with whom, perhaps, his relationship has been stormy) will challenge the trust arrangements, the right of that child to obtain any information or enforce the trust (i.e. take the trustees to court) can be excluded and vested in a different person as enforcer.

## Problems

- 28 There is little doubt that purpose trusts are principally utilised in the commercial sphere and, in this area, their principal use is to hold orphan companies in off-balance sheet transactions as discussed at paragraph 26 above. Traditionally, charitable trusts were utilised to hold underlying SPVs. A charitable trust is established and sufficiently funded to incorporate or purchase the SPV and because the SPV is owned by the trustees of a charitable trust the originator of the commercial scheme in question can distance itself from the SPV.<sup>58</sup> However, a potential problem is the conflict between the obligation of the trustees to maximise charitable return and the desire of the originator to ensure that the trustees simply

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<sup>56</sup> For a full discussion see, Underhill and Hayton *supra*. at 32.

<sup>57</sup> Alec Anderson (1991) 2 OTPR 1. In this regard, see Matthews, 'Shooting STAR...' (1997) 11 TLI 67 and Hayton [1993] JTCP 69.

<sup>58</sup> Of course, issues arise in relation to funding the SPV, identity of directors, etc.

retain the SPV. Ensuring that the trustees are bound to continue to hold the SPV (notwithstanding very little, if any, charitable return) can be difficult. In addition, it is unlikely that the Attorney General would intervene to enforce an investment provision requiring retention. For these reasons purpose trusts are increasingly the holding vehicle of choice. Care, however, has to be taken to ensure that the purpose is not merely to incorporate and hold the underlying SPV.<sup>59</sup> A requirement simply to hold a company is an investment provision and is not purposive.<sup>60</sup> There must, therefore, be purposes to which the trust fund is *applied*. This issue arises in relation to purpose trusts in all jurisdictions.

Outside of the category of "trusts of imperfect obligation" referred to at paragraph 4 above, many metropolitan common law jurisdictions do not recognise non-charitable purpose trusts. Notwithstanding the terms of the Hague Convention which would appear to require recognition of purpose trusts established in the jurisdiction of a co-signatory there is at least a possibility that a court, for example, in England may not recognise the ability of the trustees of a Bermuda purpose trust or Cayman Island STAR trust to *directly* hold a property settled in England. This problem is no different from that of using trust structures in many civil law jurisdictions that do not recognise any trust arrangement. It can fairly easily be addressed by ensuring that such property is held by an underlying company owned by the trustees of the purpose trust.

### Public Policy

- 29 Any trust that is created for an illegal purpose is void.<sup>61</sup> This includes trusts promoting or encouraging immorality, the separation of spouses, fraud, dishonesty, or other matters contrary to public policy as well as trusts tending to the general restraint of marriage (unless of a second marriage), or encouraging the breach of the sanctity of marriage or interfering

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<sup>59</sup> See David Hayton, "Exploiting the Inherent Flexibility of Trusts" [1999] JTCP Vol. 7 No.2 69, 81-84.

<sup>60</sup> Paul Matthews, 'Shooting Star', Trust Law International Vol.11 No.3 1997 67, 68; Hayton [1993] JTCP, 69.

<sup>61</sup> See Underhill & Hayton, *supra* Article 11; Glasson, International Trust Laws. Para B4.22 where it is stated "If the purpose of the trust is capricious, useless, wasteful, harmful, illegal or otherwise contrary to public policy, it will fail."



drastically with parental duties. Directions to manage property in a capricious manner will be void.